

IN THE

Supreme Court of the United States AUG 17 1988

OCTOBER TERM, 1988

JOSEPH F. SPANIOL, JR.
CLERK

HELEN GJESSING, Individually and as President of Save Long Bay Coalition, Inc., LEONARD REED, Individually and as President of Virgin Islands Conservation Society, Inc., KATE STULL, Individually and as President of League of Women Voters of V.I., Inc., LUCIEN MOOLENAAR, Individually and as President of Virgin Islands 2000, Inc., RUTH MOOLENAAR, Individually and as Director of St. Thomas Historical Trust, Inc.,

and *Appellants*,

LEGISLATURE OF THE VIRGIN ISLANDS,
v. *Appellant*,

WEST INDIAN COMPANY, LTD.,
v. *Appellee*,

GOVERNMENT OF THE VIRGIN ISLANDS.

Appellee.

**On Appeal from the United States
Court of Appeals for the Third Circuit**

**RESPONSE OF APPELLANTS HELEN GJESSING,
ET AL., TO MOTION TO DISMISS OR AFFIRM**

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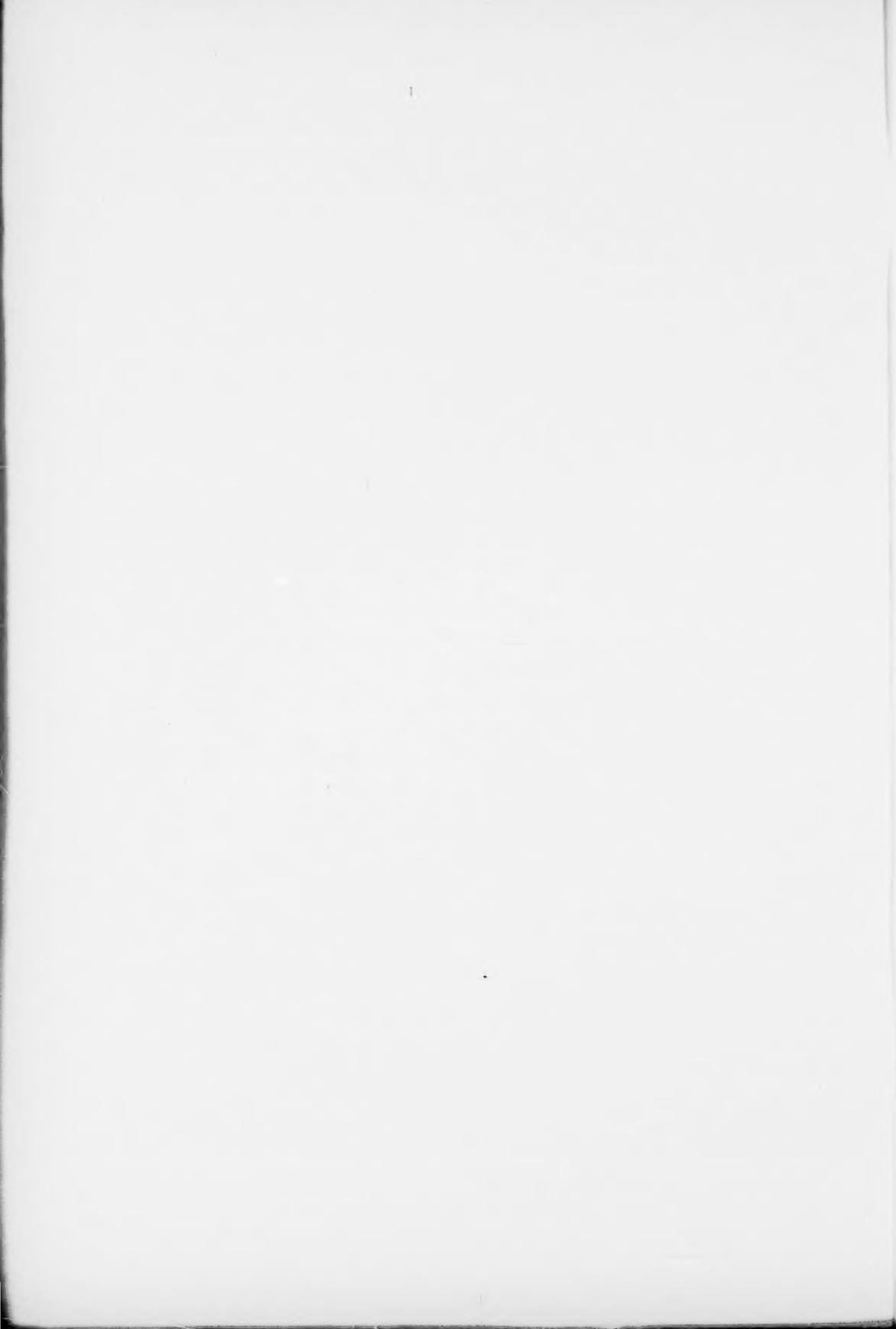


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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 87-2132

HELEN GJESSING, Individually and as President of Save Long Bay Coalition, Inc., LEONARD REED, Individually and as President of Virgin Islands Conservation Society, Inc., KATE STULL, Individually and as President of League of Women Voters of V.I., Inc., LUCIEN MOOLENAAR, Individually and as President of Virgin Islands 2000, Inc., RUTH MOOLENAAR, Individually and as Director of St. Thomas Historical Trust, Inc.,

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GOVERNMENT OF THE VIRGIN ISLANDS,
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**On Appeal from the United States
Court of Appeals for the Third Circuit**

**RESPONSE OF APPELLANTS HELEN GJESSING,
ET AL., TO MOTION TO DISMISS OR AFFIRM**

Pursuant to Supreme Court Rule 16.5 Appellants Helen Gjessing, *et al.*, respond to Appellee, West Indian Company, Ltd.'s ("WICO") Motion to Dismiss or Affirm as follows:

I. INTRODUCTION

Contrary to its intended objective of trivializing the Appellants' arguments as set forth in their respective Jurisdictional Statements, Appellee WICO has unwittingly drawn into sharp focus conflicts in the interpretation and application of existing Supreme Court decisions, as well as disclosing other constitutional conflicts, both procedural and substantive. In combination, these conflicts solicit, in a most compelling and persuasive manner, this Court's review, whether by appeal, as a matter of right, pursuant to 28 U.S.C.A. § 1254(2), or by grant of certiorari, pursuant to 28 U.S.C.A. § 2103. Contrary to WICO's assertion, the substantial issues involved in this action have far-reaching national and territorial impact.

II. THIS COURT MAY ASSERT JURISDICTION OF THIS MATTER BY APPEAL OR BY WRIT OF CERTIORARI

Appellee's assertion that this Court is without jurisdiction of this appeal is incorrect in two respects. From Appellants' research, it would appear that this Court has not rendered a decision on the application of 28 U.S.C.A. § 1254(2) to appeals concerning statutes of the unincorporated territories of the United States. Appellants Gjessing, *et al.*, strongly assert that this Court has jurisdiction pursuant to 28 U.S.C.A. § 1254(2) for the reasons more fully addressed in the Response of Appellant Legislature of the Virgin Islands. Contrary to the assertions of WICO, the status of enactments of the Legislature of the Virgin Islands is distinguishable from that of the free-associated Commonwealth of Puerto Rico and the federally administered District of Columbia and should be treated as within the provisions of 28 U.S.C.A. § 1254(2). Further, unlike these areas, the highest court of last resort for the Virgin Islands is this Court, as no territorial supreme court exists.

Should this Court, however, find that appellate jurisdiction is not proper under 28 U.S.C.A. § 1254(2), it is respectfully requested that the customary practice of converting the jurisdictional statement to a petition for writ of certiorari, timely filed, pursuant to 28 U.S.C.A. § 2103 be applied to preclude dismissal of this action so as to allow Appellants' case to be heard. This request is consistent with the established precedent of this Court. See: *California Coastal Commission v. Granite Rock Company*, ___ U.S. ___, 107 S.Ct. 1419 (1987); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970).

III. SUBSTANTIAL QUESTIONS ARE PRESENTED

WICO misinterprets the basic question presented to this Court in claiming that the Court of Appeals' decision is manifestly correct. The question is whether Act No. 5188 ("the Repeal Act") (App. 175a) constitutes an unconstitutional impairment of WICO's alleged contract rights. That question presents a substantial issue for review by this Court. It is the position of Appellants Gjessing, *et al.*, that an analysis of the legal principles underlying the formation of the Settlement Agreements, from which these rights are derived, is necessary to resolve the question. WICO, on the other hand, seeks a short-cut to this process by having us assume that the agreements are valid and proceed directly to a takings analysis. Should the agreements be invalid, this issue will not be reached.

A. A Substantial Question As To The Proper Application Of The Public Trust Doctrine Does Exist

Conspicuously absent from Appellee's Motion to Dismiss or Affirm is any analysis whatsoever which would disclose that the test enunciated by this Court in *Illinois Central Railway Co. v. Illinois*, 146 U.S. 387 (1893) was ever appropriately applied in authorizing the conveyance of trust lands. Attempting to seek comfort in the assump-

tion that it held valid "existing rights" (Motion, p. 21), Appellee failed to address Appellants' contentions that, in view of WICO's continuing failure to disclose its specific development plans,¹ (1) no finding was or could be made by the Legislature that the proposed development would improve the public's interest in the *jus publicum*; and (2) no finding as to whether the purported extinguishment of the *jus publicum* could be achieved without substantial impairment of the public's interest in the remaining trust lands and waters was ascertainable. Further, throughout this action, identification of and concern for the traditional public uses of the property and the cultural and aesthetic importance of preserving the remaining shoreline of St. Thomas Harbor has been lacking. If the Appellants' contentions cannot be rebutted, the requisite elements of the *Illinois Central* test are not met. Accordingly, any conveyance of trust lands by the Government of the Virgin Islands to WICO was in violation of the Public Trust Doctrine.

**B. It Is Imperative That The Unfettered Exercise Of
The Police Power Be Protected, Which The Legis-
lature Sought To Do In Act No. 5188**

Long Bay is in a vital location in the harbor of St. Thomas. The St. Thomas Harbor has been noted both for its picturesque quality and its marine activity. It has been an important part of the island's way of life and economy from the early Eighteenth Century. It has been a center for trans-shipment of cargo from all parts of the world; it is the most popular cruise ship port in the Caribbean today and for years past; it is an important mooring center for yachts from all over the world; and

¹ In contradistinction to WICO's defense that its development intentions have been disclosed (WICO Motion p. 9, n. 9), it should be noted that paragraph 11(b) of the Second Addendum (App. 165a) lists the *possible* uses to which the filled lands may be put. Nowhere is it stated specifically which use WICO intends to undertake; nor is it possible for WICO to undertake all the permitted uses.

it has provided a readily accessible shoreline for town-folk and fishermen. The continued use of its limited space for these traditional purposes could be disastrously affected by development on Long Bay.

These are some of the reasons why the people of the Virgin Islands, through their legislature and coastal regulations, must control the fate of the harbor; must control development on the bays of the harbor, notably Long Bay; must control mooring and docking in the harbor; and must control dredging and filling in the harbor. The people through their elected representatives have a responsibility to preserve and protect this famous harbor as the economic lifeblood of the island of St. Thomas, and of the Territory of the Virgin Islands.

They must also preserve its beauty and insure against encroachments not compatible with the traditional uses of this special harbor.

WICO's reference to the three-prong test of *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), completely ignores the contention that the first prong of the test was not met. No significant impairment was established because WICO had no justifiable expectation that land acquired through reclamation would be unregulated. Other than applying WICO's interpretation of Act No. 4700 so as to find an exclusive exception, all property in the coastal zone, whether privately or publicly held, is subject to strict regulation. To uphold the regulatory exception granted to WICO by contract would constitute "Special Legislation" prohibited by 48 U.S.C.A. § 1471 in effect at the time Act No. 4700 was enacted. (App. 248a).

The Repeal Act, therefore, sought to nullify a previous unlawful and *ultra vires* act and to restore the unfettered exercise of the police power.

C. Whether The Settlement Agreements Violate A Federal Statutory Prohibition On Modification Of International Treaties By Legislative Enactment Does Pose A Substantial Federal Question

WICO seeks to summarily dismiss, as did the Court of Appeals, Appellants' contention that 48 U.S.C.A. § 1574 (a) (App. 187a) prohibited the Legislature from enacting any law modifying the provisions of a treaty entered into by the United States. Adopting a "result oriented" posture, WICO assumes that it will automatically acquire the right derived from the 1917 Treaty (Motion p. 22) to dredge, reclaim, and develop 42 acres in the Harbor if the Settlement Agreements are declared invalid. Clearly, if the scenario were as WICO paints, WICO would not be so tenaciously and unrelentlessly defending the 1982 Addendum. WICO is fully aware, as was the Court of Appeals (App. 28a-29a), that if the Settlement Agreements are declared invalid, any uncertainty in title to the submerged trust lands at Long Bay created by the "subject to" language of the 1974 Territorial Submerged Lands Act (App. 193a) will be removed. As WICO was given a contingent license to dredge and fill the Harbor (App. 101a), it will only have a highly debatable claim, subject to diplomatic interpretation, to 42 acres of submerged or filled lands, all of which will be subject to the full exercise of the Government's police powers. In view of this contingency, should WICO be determined to have the rights asserted under the Agreements, it would, in fact, be gaining rights which, under the terms of the Treaty, would have lapsed. Thus, the terms of the Treaty would have been modified to WICO's benefit, not its detriment.

D. The Assertion That The Common Law Rule Against Perpetuities Was Modified By Statute Is Contrary To Precedent

Appellee's disregard for established precedent of this Court is plainly represented in its assertion that the application of the common law Rule Against Perpetuities

is without merit. In fact, its reliance on the statements of the District Court and the Court of Appeals highlight the importance of the conflict presented. The holdings of the lower courts that the common law rule was modified merely by the language "with the full force and effect of law" (App. 176a), is plainly contrary to established principles of statutory construction. *Norfolk Redevelopment & Housing Authority v. C. & P. Telephone*, 464 U.S. 30, 36 (1983).

CONCLUSION

Appellants Gjessing, *et al.*, seek to regain the inalienable right and power of the People of the Virgin Islands, acting through their legislators, to fully exercise the police powers conferred on the Government of the Virgin Islands over Appellee, WICO, to the same extent and degree as any developer in the coastal zone. To this end Appellants challenge as erroneous the decision of the Court of Appeals that the Repeal Act constituted a constitutional violation and assert that the lower court's decision raises substantial constitutional issues requiring review by this Court.

Respectfully submitted,

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